

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

vs.

MOTOROLA, INC., MOTOROLA
MOBILITY, INC., and GENERAL
INSTRUMENT CORPORATION,

Defendants

Case No. 10-1823

SUPPLEMENTAL JOINT STATUS
REPORT

Plaintiff Microsoft Corporation (“Microsoft”), and defendants Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility, Inc., and General Instrument Corporation (individually and collectively “Motorola”), by and through their counsel below, hereby submit this Supplemental Joint Status Report and proposed Discovery Plan pursuant to Rules 16 and 26(f) of the Federal Rules of Civil Procedure, Rules 16 and 26 of the Local Civil Rules for the Western District of Washington, the Court’s Minute Order dated December 7, 2010, and the Court’s oral order of February 23, 2011, at which time the Court directed the parties to submit this report within two weeks from the date that *Motorola Mobility, Inc., et al. v. Microsoft Corporation*, No. 10-CV-699 (W.D. Wisc.), was transferred to this district. That case was

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1 received in this district on February 28, 2011 and is now captioned *Motorola Mobility, Inc., et*
2 *anon. v. Microsoft Corporation*, 2:11-CV-00343-JLR (the “Transferred Action”).

3 1. Statement of Case

4 Microsoft's Statement:

5 This action involves allegations by Microsoft that the three Motorola defendants have
6 breached obligations they undertook to offer licenses to their purportedly “essential” or
7 “necessary” patents on reasonable and non-discriminatory (“RAND”) terms and conditions.
8 When Motorola chose to participate in the industry standard setting process for developing
9 both the 802.11 WLAN wireless internet standard and the H.264 video compression standard,
10 it agreed to offer licenses on RAND terms to Microsoft and other prospective licensees for any
11 patents that are necessary or essential to practice the respective standards.

12 Motorola has identified a number of patents as allegedly essential or necessary to both
13 the WLAN wireless standard and the H.264 video compression standard. Microsoft asserts
14 that Motorola has not complied with its obligation to offer Microsoft a license to these
15 technologies on RAND terms and conditions. Instead, Motorola has expressly conditioned any
16 such license on payment of an exorbitant, discriminatory, and unreasonable royalty.
17 Microsoft’s position is that Motorola’s demand does not comply with the obligations it
18 undertook when participating in the standard-setting process.

19 Specifically, Motorola has demanded that Microsoft pay a royalty of 2.25 percent per
20 unit, *based on the price of the end-product* (such as an Xbox 360, computer, phone, etc.); i.e.,
21 this very substantial royalty is not applied to the value of the specific component containing
22 Motorola’s allegedly essential patent, much less limited to the allegedly patented feature.
23 Microsoft contends that the royalty demanded by Motorola falls well outside the boundaries of
24 a reasonable and non-discriminatory royalty and therefore violates the commitment Motorola
25

1 made to the Institute of Electrical and Electronics Engineers (“IEEE”), the International
2 Telecommunications Union (“ITU”), and their members.

3 On November 10, 2010, one day after Microsoft initiated this action, defendants
4 Motorola Mobility and its wholly-owned subsidiary, General Instrument Corporation, filed two
5 complaints for patent infringement against Microsoft in the Federal District Court for the
6 Western District of Wisconsin, the “Transferred Action” identified above (Case No. 3:10-CV-
7 699) and Case No. 3:10-CV-700 (the “700 Action”).

8 The Transferred Action seeks to enforce against Microsoft three patents that Motorola
9 asserts are necessary or essential to implement the H.264 standard and which Motorola was,
10 therefore, obliged – but failed – to offer to license to Microsoft on RAND terms and
11 conditions. These patents were also identified in Motorola’s portfolio of patents and pending
12 applications that was attached to Motorola’s October 29, 2010 demand letter to Microsoft,
13 which, *inter alia*, formed the basis for Microsoft’s claims relating to the H.264 standard in this
14 action. Microsoft’s position is that Motorola’s patent claims are compulsory counterclaims to
15 Microsoft’s claims in this action (which was filed before Motorola filed the Transferred
16 Action) and should be dismissed and then re-filed as compulsory counterclaims in this action.

17 While it was still pending in Wisconsin, Microsoft moved to have the Transferred
18 Action stayed, dismissed, or transferred to this district. On February 18, 2011, the Western
19 District of Wisconsin granted Microsoft’s motion to transfer the action to this district pursuant
20 to 28 U.S.C. § 1404. The Wisconsin Court left it for this Court to decide whether Motorola’s
21 claims in the Transferred Action are compulsory counterclaims in this Action.

22 On March 10, 2011, Microsoft filed a motion to dismiss the Transferred Action without
23 prejudice to Motorola re-filing its claims as counterclaims in this Action because (1)
24 Motorola’s claims are compulsory counterclaims under Fed. R. Civ. P. 13(a), and (2) dismissal
25 is warranted under the well-settled “first-to-file” rule.

1 The second Wisconsin action, the 700 Action, was stayed because it overlaps with a
 2 complaint for patent infringement Motorola filed against Microsoft with the International
 3 Trade Commission (“ITC”), captioned *In the Matter of Certain Gaming and Entertainment*
 4 *Consoles, Related Software, and Components Thereof* (ITC Case No. 337-TA-752) (the “ITC
 5 Action”) on November 22, 2010.

6 Motorola’s ITC Action and its companion Wisconsin 700 Action involve five patents
 7 that Motorola claims are “necessary” or “essential” to practice the WLAN or H.264 standard.
 8 In these actions, despite Motorola’s obligation and failure to offer a license for such patents on
 9 RAND terms, Motorola is seeking – among other forms of relief – an injunction and to exclude
 10 Microsoft from importing, marketing, advertising, distributing, offering for sale, selling, or
 11 transferring any products that practice these patents. Microsoft asserts that Motorola’s filing of
 12 the Transferred Action, 700 Action, and ITC Action absent having first made a RAND offer to
 13 Microsoft constitute further breaches of Motorola’s contractual commitments to the IEEE,
 14 ITU, and their members.

15 Motorola has refused to offer Microsoft a license to the patents Motorola identified as
 16 essential to the 802.11 and H.264 standards on RAND terms and conditions. Instead, Motorola
 17 has demanded royalty payments that are wholly disproportionate to the royalty that the asserted
 18 patents should command under any reasonable calculus and have initiated three separate
 19 actions to, *inter alia*, enjoin Microsoft from practicing patents Motorola claims are essential.

20 Motorola's Statement:

21 In response to Microsoft’s Statement of the Case, Motorola submits that Microsoft’s
 22 breach of contract claims in this action (“the RAND action”) are an ill-conceived attempt to
 23 avoid Microsoft’s obligation to have negotiated with Motorola for an “essential” patent license,
 24 while also attempting to prevent Motorola from addressing Microsoft’s underlying patent
 25 infringement. In essence, Microsoft has rejected the opportunity — and requirement — to

1 negotiate RAND license terms with Motorola, even though such negotiations are what the
2 standards bodies expect. Microsoft instead seeks to embroil this Court in an unprecedented
3 RAND rate-making proceeding, in which the Court must attempt to divine RAND licensing
4 terms in the absence of the bilateral negotiations contemplated by the standards bodies.

5 Consequently, Motorola asserts this complaint is procedurally and factually flawed, and
6 should be dismissed with prejudice. It is an improper, anticipatory filing, which also seeks to
7 preempt the patent infringement actions that Microsoft knew its refusal to negotiate would
8 force Motorola to file. Thus, this anticipatory filing is not entitled to be rewarded as a “first
9 filed” action, contrasted with Motorola’s patent infringement action (the action transferred
10 from Wisconsin).

11 To redress this improper complaint, Motorola has filed its Renewed Motion To Dismiss
12 (ECF No. 57), noted on the motion calendar for April 1, 2011. This motion seeks to dismiss
13 Microsoft’s amended complaint in its entirety for lack of subject matter jurisdiction and for
14 failure to state a claim for which relief can be granted.

15 Like its original complaint, Microsoft’s amended complaint relies solely on two letters
16 sent by Motorola to Microsoft that offered to license Motorola’s “essential” patents on RAND
17 terms and proposed a royalty rate to be applied to relevant Microsoft products. The letters
18 proposed no other terms — those terms were left for the parties to establish during the
19 negotiations contemplated by the standards organizations and that Motorola anticipated would
20 take place. Microsoft contends that these opening proposals were so unreasonable as to justify
21 Microsoft’s decision to sue Motorola rather than to engage in licensing negotiations. But the
22 mere act of sending these offer letters cannot form the basis of a plausible, or ripe, cause of
23 action.

24 Unlike its original complaint, Microsoft’s amended complaint also relies on Motorola’s
25 patent infringement actions (referred to by Microsoft herein as the “Transferred Action”; the
“700 Action”; and the “ITC Action”), that were brought *after* Microsoft commenced this
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1 action. Those subsequently-filed Motorola actions cannot be a basis or justification for
2 Microsoft's claims. Rather than file this lawsuit, Microsoft should have responded to the offer
3 letters and engaged in negotiations. Instead, Microsoft — knowing that it was not willing to
4 negotiate a license and fairly compensate Motorola for the use of Motorola's patents — rushed
5 to the Courthouse with this premature, groundless action premised solely on Motorola's act of
6 sending the two offer letters. Microsoft's motivation for filing this unripe suit is transparent —
7 use the judicial system to deny or delay compensation to Motorola for Microsoft's ongoing
8 infringement, and to insure preemptively its own forum and action in which to litigate should
9 Motorola elect to file patent infringement actions to redress Microsoft's repudiation of the
10 RAND negotiation process.

11 Because Microsoft's response to Motorola's opening offer was to file suit, any
12 contractual or other duty to negotiate a RAND license was extinguished. Indeed, permitting
13 Microsoft's claims to proceed in this Court would authorize premature suits against all holders
14 of "essential" patents for supposed breach of contract after the holders merely offer to license
15 their patents under terms to be subsequently negotiated. It also would punish those patent
16 holders for enforcing their rights after such license offers are repudiated, by depriving the
17 patent owners of the choice of timing and forum for an enforcement action.

18 Thus, Microsoft's amended complaint should be dismissed for failure to state a claim,
19 and because it seeks an advisory opinion on an alleged dispute that was not ripe for
20 adjudication. As for Microsoft's March 10 motion to dismiss Motorola's complaint in the
21 Transferred Action, Motorola will oppose that motion, because the patent infringement claims
22 brought by Motorola in that action are not compulsory counterclaims in this action, and
23 because the amended complaint in this action was filed after the Transferred Action. However,
24 if the amended complaint in this action is not dismissed, then Motorola submits that discovery
25 in this action should be coordinated with discovery in the Transferred Action. Motorola

1 submits that it is premature to decide whether and to what extent the actions should be
2 consolidated for trial.

3 2. ADR Method: The Parties believe that a party-appointed mediator as described
4 in Local Rule 39.1(b)(3) should be the initial method of alternative dispute resolution. The
5 parties note that they are involved as parties in a number of other actions in this and other
6 forums, some of which also require the parties to participate in ADR proceedings. In an action
7 pending in the Southern District of Florida, the parties have agreed to retain Edward Infante of
8 the San Francisco office of JAMS to mediate the disputes between the parties. This mediation
9 is required to take place by August 2011. Although the Florida action does not relate to the
10 subject matter of this case, the parties currently expect that this mediation will address all
11 disputes between the parties, including the disputes in this action.

12 3. ADR Timing: Because the mediation required by the Southern District of
13 Florida must take place before August 3, 2011, the parties currently expect the mediation
14 before Mr. Infante to take place in July, 2011.

15 4. Deadline for Joining Additional Parties: The Parties propose that any additional
16 parties be joined by no later than May 2, 2011.

17 5. Discovery:

18 A. The Parties conducted a FRCP 26(f) conference on January 12, 2011 and
19 served their initial disclosures on February 7, 2011.

20 B. The subjects on which discovery may be needed and whether discovery
21 should be conducted in phases or be limited to or focused upon particular issues:

22 Microsoft's Position

23 Microsoft anticipates engaging in discovery to the full extent contemplated by the
24 Federal Rules of Civil Procedure relating to Motorola's efforts to license its allegedly
25 "necessary" or "essential" patents to Microsoft and other third parties on allegedly RAND

1 terms pursuant to its obligations to the IEEE, ITU, and its members. Microsoft does not
 2 currently believe that discovery should be conducted in phases. However, Microsoft reserves
 3 the right to revisit this issue should the Court grant Microsoft's pending motion to dismiss the
 4 Transferred Action, and Motorola files its patent infringement claims as compulsory
 5 counterclaims in this action.

6 Microsoft further believes that the parties should be limited to 10 depositions and 25
 7 written interrogatories each, as provided in FRCP 30 and FRCP 33. The issues involved in this
 8 action are straight-forward and primarily legal in nature, and there is currently no need to
 9 depart from the presumptive limits set forth in the Federal Rules of Civil Procedure. To the
 10 extent either party believes that additional depositions or interrogatories may be needed, that
 11 party may seek leave of the Court pursuant to Rule 26(b)(2)(A).

12 Motorola's Position

13 Motorola anticipates that determination of a RAND rate for Motorola's domestic and
 14 foreign 802.11 and H.264 portfolios, or a portion thereof, will be a complex task, and will
 15 require significant discovery from Microsoft and Motorola, and will likely also include
 16 discovery from many non-parties who have licensed or offered to license similar essential
 17 patents on RAND terms. Thus, discovery likely will be directed to, *inter alia*: (i) Motorola's
 18 and Microsoft's efforts to license necessary or essential patents to others on RAND terms
 19 pursuant to any obligations to the IEEE, ITU, and their members; (ii) competitive technologies
 20 at the time of the relevant standard setting events and today; (iii) licenses offered and/or
 21 granted by non-parties under the same intellectual property rights requirements or similar
 22 requirements of IEEE, ITU and other standards setting organizations; and (iv) the relative
 23 import of the patented features in the accused products.

24 If this action is not dismissed, and is coordinated with the Transferred Action, then the
 25 addition of three Motorola patents and two Microsoft patents to the case will require additional

1 time and effort in discovery. In that event, the Court should instruct the parties to reconsider
2 the scope of discovery.¹

3 If this action is not dismissed, the parties should be permitted 20 depositions. If this
4 action is not dismissed, and is coordinated with the Transferred Action (which includes claims
5 based on five patents), the parties should be permitted 35 depositions and 50 interrogatories.
6 As agreed to by the parties in the Transferred Action, if this action is dismissed, there is a limit
7 of 40 interrogatories in the Transferred Action.

8 C. What changes should be made in the limitations on discovery imposed
9 under the Federal and Local Civil Rules, and what other limitations should be imposed;

10 Microsoft's Position

11 As described above in Paragraph 5B.

12 Motorola's Position

13 As described above in Paragraph 5B.

14 D. A statement of how discovery will be managed so as to minimize
15 expense (e.g., by foregoing or limited depositions, exchanging documents informally, etc.):

16 Microsoft's Position

17 As described above in Paragraph 5B.

18 Motorola's Position

19 As described above in Paragraph 5B.

20 E. Any other orders that should be entered by the Court under FRCP 26(c)
21 or under Local Rule CR 16(b) and (c).

23 ¹ Motorola also notes that Microsoft has moved in the District Court for the Western District of Wisconsin for
24 transfer to this District of yet another case between the parties: *Motorola Mobility, Inc. v. Microsoft Corporation*,
25 Case No. 3:10-cv-826. That case involves assertions of infringement of five Motorola patents and five Microsoft
patents, none of which is essential for any industry standard and none of which involves any RAND-related
issues. However, if transfer is ordered, additional discovery coordination and scheduling issues will likely need to
be addressed.

1 The parties anticipate the need for a protective order to ensure adequate protections are
 2 in place governing disclosure of confidential and/or commercially sensitive materials. Because
 3 of the pendency of other actions between the parties, the parties are attempting to develop a
 4 uniform Protective Order that can be entered in all of their actions.

5 6. Date of Discovery Completion:

6 Microsoft's Position

7 Microsoft anticipates that discovery can be completed by September 1, 2011.
 8 Microsoft proposes that the parties exchange opening expert reports, for issues on which they
 9 bear the burden of proof, on July 1, 2011, and exchange rebuttal expert reports on August 1,
 10 2011. Microsoft reserves the right to revisit this issue should the Court grant Microsoft's
 11 pending motion to dismiss the Transferred Action, and Motorola files its patent infringement
 12 claims as compulsory counterclaims in this action.

13 Motorola's Position

14 This is a novel action. No Court has adjudicated a RAND licensing rate and,
 15 accordingly, there is no body of judicial law on which the parties can predicate discovery.
 16 Discovery in this action will plow new ground and likely will be complex. Accordingly, if this
 17 action is not dismissed, Motorola anticipates that discovery can be completed by May 1, 2012.
 18 Motorola proposes that the parties exchange opening expert reports, for issues on which they
 19 bear the burden of proof, on March 1, 2012, and exchange rebuttal expert reports on April 2,
 20 2012. If this action is not dismissed, and is coordinated with the Transferred Action, Motorola
 21 anticipates that discovery can be completed by September 1, 2012, with opening expert reports
 22 due on June 10, 2012 and rebuttal reports due July 17, 2012. As agreed to by the parties and
 23 ordered by the transferor Court, if this action is dismissed, discovery in the Transferred Action
 24 can be completed by February 24, 2012.

1 7. Magistrate Judge Referral: The Parties do not agree to referral of the case to a
2 magistrate judge.

3 8. Bifurcation:

4 Microsoft's Position

5 Microsoft's current belief is that this action does not lend itself to bifurcation, and
6 submits that it would be more efficient for the Parties and the Court to proceed to trial on all
7 issues. However, Microsoft reserves the right to revisit this issue if the Court grants
8 Microsoft's pending motion to dismiss the Transferred Action, and Motorola re-files its patent
9 infringement claims as compulsory counterclaims in this action.

10 Motorola's Position

11 Motorola agrees that this action does not now lend itself to bifurcation, but also
12 respectfully reserves the right to revisit this issue if the circumstances change.

13 9. Pretrial Statement/Orders: The Parties agree that Pre-Trial Statements and
14 Orders called for by Local Rules CR 16(e), (h), (i), and (l), and 16.1 should not be dispensed
15 with in whole or in part.

16 10. Suggestions for Case Simplification or Shortening:

17 The Parties will work cooperatively to identify any opportunities to streamline the case,
18 including exploring the possibility of stipulating to any undisputed facts. Each Party will also
19 consider whether any issues can be resolved prior to trial via the filing of dispositive motions.

20 In addition:

21 Microsoft's Position

22 Microsoft believes that the development and presentation of the factual and legal issues
23 relevant to this dispute should be relatively straight-forward. Microsoft anticipates filing
24 dispositive motions on at least the following two issues, which it expects could substantially
25 narrow the issues for trial or obviate the need for trial entirely:

(1) Whether Motorola was obligated to offer licenses to Microsoft for any of the patents they asserted were "essential" to the 802.11 WLAN wireless internet standard and the H.264 video compression standard on reasonable and non-discriminatory (RAND) terms and conditions; and

(2) Whether Motorola violated its RAND obligations by demanding that Microsoft pay a royalty of 2.25 percent per unit, based on the price of each end-product incorporating the allegedly "essential" patent.

Motorola's Position

Motorola believes that the development and presentation of factual and legal issues relevant to this dispute will plow new ground and accordingly are complex (indeed, have never been attempted by any court in the United States), so the discovery and trial burdens should not be minimized. Motorola expects to oppose any such motions filed by Microsoft.

11. Trial Readiness:

Microsoft's Position

If the Court grants Microsoft's motion to dismiss Motorola's complaint in the Transferred Case without prejudice to Motorola re-filing its claims for patent infringement as counterclaims in this Action and Motorola does so, Microsoft believes the case can be ready for trial by May 2012.

If the Court does not grant Microsoft's motion to dismiss, Microsoft believes the case can be ready for trial by January 2012.

Motorola's Position

If this action is not dismissed, Motorola believes the case can be ready for trial by September 2012. If this action is not dismissed, and if the Court at some point consolidates this action with the Transferred Action, Motorola believes the case can be ready for trial by January 2013. As agreed to by the parties and ordered by the transferor Court, if this action is

1 dismissed, the Transferred Action can be ready for trial by May 2012 — or by June 2012, in
 2 order to provide 120 days from the completion of discovery as contemplated by LCR 16(f).

3 12. Jury Trial: The Parties have not requested a jury trial. Motorola has not yet
 4 answered the complaint, and respectfully reserves its right to request a jury pursuant to Rule
 5 38(b), Fed. R. Civ. P.

6 13. Trial Days:

7 Microsoft's Position

8 If the Court grants Microsoft's motion to dismiss Motorola's complaint in the
 9 Transferred Case without prejudice to Motorola re-filing its claims for patent infringement as
 10 counterclaims in this Action and Motorola does so, Microsoft believes that the trial can be
 11 completed in 8-10 days.

12 If the Court does not grant Microsoft's motion to dismiss, Microsoft believes that the
 13 trial can be completed in 4-6 days.

14 Motorola's Position

15 Motorola believes that the trial can be completed in 8-10 days.

16 14. Name and address of all trial counsel:

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10 15. Service: Defendants have been duly served with the Complaint.

11 16. Scheduling Conference: The Parties do not anticipate the need for a scheduling
12 conference at this time, but reserve the right to request such a conference if and when the need
13 arises.
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DATED this 14th day of March, 2011.

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